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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Fees for Ancillary or Supplementary	)	MM Docket No. 97-247
Use of Digital Television Spectrum	)	
Pursuant to Section 336(e)(1)	)	
of the Telecommunications Act of 1996	)	

JOINT COMMENTS OF COX BROADCASTING, INC., PAXSON COMMUNICATIONS CORPORATION, AND MEDIA GENERAL, INC. ON THE NOTICE OF PROPOSED RULEMAKING

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SUMMARY

Determining an appropriate fee program for DTV ancillary services at this time is premature because there are far too many variables and unknowns. Broadcast licensees need incentive and time to create what will be essentially a new industry. The establishment of a fee before anyone really knows what the market will be for such services will chill entrepreneurial interest in experimentation with a broad range of services -- a clear detriment to consumers in the long run. The Commission ideally should postpone the establishment of a fee program for five years until critical information becomes available and can be factored into a rational formula for payments.

If the Commission decides it must nonetheless proceed to establish a fee program now, it should allow at least a two-year grace period before any fees are actually assessed, followed by at least a three-year period in which a low fee of one percent (1.0%) of gross revenues could be collected. This fee is relatively simple to administer compared to cost-based fees, recovers a portion of the (assumed) value of the spectrum used for these services, and is more than sufficient to avoid unjust enrichment in the early stage of this business, particularly since these services will likely not yield any profits for several years (during which time even a low 1.0% fee could constitute a penalty for broadcast licensees). Determining a fee that approximates the "auction-value" of the spectrum is simply not feasible to any extent at this time. The Commission can reevaluate the industry after five years and if the statutory criteria require it, the fee program can be adjusted appropriately, based on more information.

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Cox Broadcasting, Inc. ("Cox"), Paxson Communications Corporation ("PCC") and Media General, Inc. ("Joint Commenters"), by their attorneys, jointly file these comments in response to the Notice of Proposed Rulemaking, FCC 97-414, released December 19, 1997, concerning payments by broadcasters for digital television ("DTV") ancillary or supplementary services ("NPR).

I. IT IS PREMATURE TO ESTABLISH A FEE FOR DTV ANCILLARY SERVICES.

Joint Commenters understand that the Commission is obliged under Section 201 of the Telecommunications Act of 1996 ("1996 Act") to establish a fee program for ancillary or supplementary services provided on DTV spectrum and for which a licensee is paid a subscription fee or receives compensation other than commercial advertising revenues.[1/] However, it is much too soon to attempt to establish a fee program, given the limited availability of pertinent information about these so-called "feeable ancillary services."[2/] The DTV ancillary services "industry" is barely in its infancy. Broadcast licensees do not yet know exactly which ancillary services they will provide, which types of services besides free television service will prove most in demand, which technology is going to prove to be most effective and most cost-effective, or whether other spectrum or other preferable means exist to provide a particular service. Joint Commenters anticipate, and assume that other licensees similarly anticipate, an extensive period of trial and error -- a time of experimentation with particular services which may or may not prove successful or enduring, and if they fail, different services will need to be tested. Setting a fee too soon, particularly a high and/or administratively burdensome fee, may well discourage broadcasters from considering certain types of ancillary services because of uncertainty about whether a sufficient (if any) revenue stream might be generated by them. In fact, some broadcasters might be dissuaded from

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1/ See Pub. L. No. 104-104, 110 Stat. 56 § 201 (1996) (codified at 47 U.S.C. § 336) ("Section 336"). See also H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 160 (1996) ("Conference Report").

2/ See NPRM, ¶ 5.

providing any ancillary services at all, at least in the beginning. This is precisely what the Commission has stated it does not intend. (See NPRM, ¶ 10.)

A. Deferral Is Not Inconsistent With Section 336.

The 1996 Act does not specify a date by which the Commission must commence the actual assessment of fees on broadcast licensees. Section 336(e)(4) provides only that, within five years after enactment of the 1996 Act, the Commission must "report to the Congress on the implementation of the program . . . and . . . annually thereafter advise the Congress on the amounts collected pursuant to such program."[3/] The Conference Report does not address when the fees must commence. (See Conference Report, supra n. 1, at 159-61.) A status report to Congress on "implementation of the program," however, does not necessarily require specifics on the fee amounts and methods of fee collection. In other words, there is nothing to preclude a Commission report by the due-date which explains that, based on broadcasters' concerns and business reality, actual fee collections are being postponed for the short-term until information is available to ensure that a more rational fee program can be developed. Joint Commenters recognize that the five-year status report would be more meaningful if it were to discuss specific DTV ancillary services and their progress to date. In that regard, the Commission could solicit such information from the industry, on a confidential basis, prior to drafting that report.

[3/] 47 U.S.C.A. § 336(e)(4) (West Supp. 1998).

B. Certain Requirements of Section 336(e) Cannot Be Satisfied at This Time.

Congress clearly underestimated the time it would reasonably take to get the DTV ancillary services industry underway and, consequently, to determine a fee program that makes sense. Bear in mind that the development of ancillary services provided on DTV spectrum requires the creation of a wholly new product. While some might argue that the cable television ("CATV") model is analogous, there are striking differences. First, cable operators were merely offering a new delivery system for a product that had already been around for many years and for which the market was entrenched nationwide, namely, broadcast television programming. The public's strong desire for this product was crystal-clear. In sharp contrast, whether there is a market for DTV ancillary services is yet to be determined. Second, cable systems have always operated on a franchise basis which normally gives the operator the exclusive right to operate a CATV system within a particular community. Broadcast licensees offering DTV ancillary services will have no such luxury. For both of these reasons, the creation of a market for DTV ancillary services carries far higher risks compared to the provision of programming on cable systems.

Other aspects of the legislative language similarly indicate that Congress underestimated how many "unknowns" there would be in trying to meet the requirements of Section 336. Section 336(e)(2)(A) requires that the fee program be designed to (i) "recover for the public a portion of the value of the public spectrum resource made available for such commercial use, and (ii) to avoid unjust enrichment . . . ."[4/] First of all, how can anyone possibly know the value of spectrum used for ancillary services if there is not yet a market for those services? It would

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4/ 47 U.S.C.A. § 336(e)(2)(A) (West Supp. 1998).

be like trying to set the value of oil before the existence of machinery to consume it. The Commission will need substantial data -- none of which exists today and which will likely take several years to materialize -- in order to determine the spectrum's value in this case. Second, the legislation seems to assume that there will be "unjust enrichment" if no fees are collected early on, but how can there be unjust enrichment when industry entrepreneurs face nothing but operating losses in the early years and perhaps longer? Third, and as discussed further below, how can a fee be established today which meets the legislative requirement to approximate the "auction value" of the spectrum when, as the Commission itself acknowledges (see NPRM, ¶ 15), we have no reliable way of knowing what that is?[5/] Establishing a fee program before we have answers to these many questions is surely putting the cart before the horse.

It is likely to be several years before feeable ancillary services generate sufficient revenue streams to yield operating profits and render particular services more predictable as to their long-term business prospects. As broadcast licensees are building out DTV, the Commission should adopt a fee program which encourages the greatest possible degree of technological innovation and experimentation with the broadest possible range of DTV ancillary services. Ideally, therefore, the establishment of ancillary fees should be postponed for five years until licensees have had sufficient opportunity to gather the kind of business information that logically needs to be factored into any rational formula for payments.

[5/] Section 336(e)(2)(B) requires that the program "recover for the public an amount that, to the extent feasible, equals but does not exceed (over the term of the license) the amount that would have been recovered had such services been licensed pursuant to the provisions of section 309(j) of this Act and the Commission's regulations thereunder". 47 U.S.C.A. § 336(e)(2)(b) (West Supp. 1998).

II. AT MOST, THE COMMISSION SHOULD ADOPT A 1.0% "INTERIM PERIOD" FEE, BASED ON GROSS REVENUES, THAT WOULD NOT TAKE EFFECT FOR AT LEAST TWO YEARS.

If the Commission nevertheless feels compelled to establish a fee program at this time, Joint Commenters request that the Commission establish a five-year "interim period" and defer the effective date of the actual imposition of fees for part of that interim period. The "grace period" or "fee moratorium" should last at least two years, and a fee could be imposed in year three, at the earliest, for the duration of the interim period. Further, the fee imposed on licensees for DTV ancillary services, commencing in year three or thereafter, should be set at a low level -- one percent (1.0%) of gross revenues. At the end of the five-year interim period, when more information will be available about DTV ancillary service technology, consumer demand, and likely financial success or failure of particular services, the Commission can reassess the fee program and determine whether a higher fee and/or an alternative basis (*e.g.*, net revenues or incremental profits) should be instituted prospectively.

A. A Low Fee Will Serve the Public Interest.

The imposition of a low fee after a reasonable grace period of at least two years is supported by all the same considerations that were discussed above. Because of the up-front costs associated with DTV build-out and the development of ancillary services, the revenues for at least the first several years are unlikely to be sufficient to yield any operating profits. To the extent licensees do see operating profits from such services, a lower fee payment to the U.S. Treasury will permit the licensees to reinvest more of such profit in DTV services generally. Hence, it will help broadcasters as they finance the new technology.

In addition, whereas a higher fee would create a disincentive to experiment, and therefore could pre-determine which types of services are actually developed, low fees will be more technologically neutral, allowing licensees to feel more comfortable experimenting with a broader range of ancillary services. Indeed, the Commission itself states: "The lower the fee, the more flexible the broadcaster may be in serving audience demand for services and in choosing the mix of services it provides." (NPRM, ¶ 26.) A greater willingness to experiment in the ancillary services realm is more likely to foster greater technological innovation, which will have long-term benefits and provide better choices for the consumer. The deposits into the U.S. Treasury (pursuant to Section 336(2)(A)(i)) may actually be greater under this plan than if licensees are discouraged, by higher fees, from using their DTV capacity for feeable ancillary services in the first place.

As discussed above, cable television franchise fees (normally higher than 1.0%) are irrelevant here. Nothing in the 1996 Act or the legislative history suggests that cable television or any other industry might serve as a model. On the contrary, Congress left it entirely to the Commission's discretion to determine the most appropriate "portion" of the spectrum's value to recover for the public. Therefore, a fee of one percent of gross revenues for a short interim period is not inconsistent with the statute. Moreover, the statute itself provides for periodic adjustment of the fee by the Commission.[6/] After the proposed five-year interim period, when sufficient critical data will be available, the fee program could be adjusted, as, for example, "where it is shown that it has given DTV licensees an unfair

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[6/] See 47 U.S.C.A. § 336(e)(2)(C) (West Supp. 1998).

advantage . . . as compared with their nonbroadcast competitors providing analogous services on spectrum licensed through a competitive bidding process." (NPRM, ¶ 29.)

Nor can a one-percent fee be said to provide "unjust enrichment" to broadcast licensees. Although the Commission expresses concern that a fee set "too low might not prevent the unjust enrichment of DTV licensees," it bears repeating that the provision of ancillary services on DTV spectrum certainly will generate losses for the first several years. The Commission seems to recognize this in noting the advantage of a fee that "allow[s] broadcasters to build their feeable ancillary or supplementary service to the break-even point . . . ." (NPRM, ¶ 21.) When confronted by operating losses, even non-payment of any fee does not constitute unjust enrichment. There can be no enrichment, just or unjust, from a non-profitable business.

B. A Fee Based On Gross Revenues Is, On Balance, Preferable.

The fee program must be administratively as simple as possible. Compared to the alternatives, a fee based on gross revenues[7/] derived from individual ancillary services is the simplest to understand and implement, not only for licensees, but for the Commission as well. Maintaining records of gross revenues for each feeable ancillary service would be straightforward. Moreover, the processing of gross revenues fee information by Commission staff would be straightforward, even though some level of auditing may be required, and would avoid feeable and non-feeable service cost allocation issues.

7/ See NPRM, ¶ 24.

On the other hand, a fee based in whole or in part on net revenues or incremental profits[8/] would require each company to develop cost-accounting systems (including, in the case of net revenues, a method of allocating a portion of the licensee's joint service costs to each feeable ancillary service) and to maintain financial records in such a way that the data could be turned over to Commission staff and evaluated. This would be highly burdensome for licensees. Likewise, the Commission would take on a significant additional burden, as it would have to hire and train personnel that could analyze every broadcast licensee's detailed cost data in order to verify (a) that they were in accordance with generally accepted accounting principles and otherwise sound, and (b) that the proper fee had in fact been submitted. Further complicating matters, the Commission would need to "prescribe specific cost accounting rules to insure consistent and uniform calculations of incremental cost for purposes of calculating service-specific profit." (NPRM, ¶ 23.)

Joint Commenters recognize that a gross revenues-based fee is not without its negative aspects. In an operating loss situation, the requirement nonetheless to pay a percentage of gross revenues effectively constitutes a penalty for offering feeable ancillary services inasmuch as the payment would create or increase net losses. This possibility conceivably could encourage broadcasters to offer only the very lowest-cost and lowest-risk ancillary services, consequently limiting consumer choice and dampening innovation. Hence, a fee based on gross revenues is not the most efficient in theory.[9/] It is for this reason that a low rate of one percent together with

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[8/] See NPRM, ¶¶ 21-23.

[9/] See NPRM, ¶¶ 13, 23.

the two-year (or longer) grace period described above are absolutely critical elements of an interim period program.

The Commission also solicits comment on a "hybrid fee,"[10/] which would require up-front flat dollar amount payments by licensees irrespective of the amount of revenues that might be generated by a particular ancillary service, and, in addition, would also impose a payment based on a some percentage of gross revenues. A hybrid fee is the least acceptable alternative, at least for the interim five-year period. Although administratively not that complicated, this method would be too burdensome financially. Revenues from a particular service might not even cover the up-front payment, after accounting for operating costs of the service. The hybrid method of assessing fees will create a strong disincentive to provide ancillary services and will chill technological innovation -- precisely what the Commission and Congress should not want for this new industry.

C. An "Auction-Value" Based Fee is Not Feasible At This Time.

Section 336 also requires that DTV ancillary service fees recover, "to the extent feasible," an amount that "equals but does not exceed (over the term of the license)" the amount that would have been recovered if the particular ancillary service were offered on broadcast spectrum acquired through auctions "pursuant to the provisions of section 309(j) of [the 1996 Act] and the Commission's regulations thereunder".[11/] At this time, it would be impossible to determine the "auction value" of the spectrum used for DTV ancillary services. There is thus far

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10/ See NPRM, ¶ 25.

11/ 47 U.S.C.A. § 336(e)(2)(B) (West Supp. 1998).

no experience with competitive bidding for broadcast spectrum, and there are no Commission regulations in force. The Commission only recently issued its Notice of Proposed Rulemaking concerning the implementation of Section 309(j),[12/] and it is uncertain when substantive and procedural rules will take effect and auctions can commence. The Commission also correctly recognizes that the non-broadcast auction experience cannot be used reliably as a frame of reference here. (See NPRM, ¶ 15.)

Joint Commenters fully endorse the Commission's stated commitment to a fee that is "calculable with readily available information."[13/] An auction-related fee does not meet that criterion. While this basis for fees may possibly prove attractive at some point in the future and could be reconsidered at the five-year mark, it is certainly not a "feasible" basis at this time.

D. An Optional Fee Waiver Mechanism Should Be Included.

Although a fee program that carries a requirement to maintain and submit detailed cost data for all feeable ancillary services for evaluation by the Commission (*i.e.*, the net revenues or incremental profits method) would be far too burdensome now, there may be instances where a licensee may wish to volunteer such data in order to justify non-payment of a Section 336 fee for a service that results in a net loss. Having this kind of safety net would further encourage experimentation with new, unproven services and would offer protection to broadcasters -- at their option (in years three, four and five of the interim period) -- from payment burdens until

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[12/] Notice of Proposed Rulemaking in MM Docket No. 97-234, In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, FCC 97-397 (released Nov. 26, 1997).

[13/] NPRM, ¶ 9.

such time that a service becomes profitable. If the Commission declines to provide the two-year minimum grace period described earlier in these Comments, the waiver mechanism takes on much greater significance since operating losses are to be expected in at least the early years, particularly in the higher-cost/higher-risk services. Joint Commenters therefore request that such a waiver mechanism be built into the fee program for the interim period.

III. CONCLUSION

Because there are so many unknown variables surrounding the creation of a DTV ancillary services market, a fee program which encourages the greatest possible degree of technological innovation and experimentation with the broadest possible range of DTV ancillary services is one that defers payments of any kind for a full five years. The second best alternative, if a fee program must be determined at this time, is a five-year interim period which includes a moratorium on all such fees for at least the first two years, with a fee set at 1.0% of gross revenues to begin thereafter. Any program that is more onerous in this industry's early

stages will run counter to the public interest and defeat the purposes of Section 336, rather than fulfilling them.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Joint Comments of Cox Broadcasting, Inc., Paxson Communications Corporation and Media General, Inc. on the Notice of Proposed Rulemaking" was hand-delivered this 4th day of May, 1998, to the following:

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